Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-1537

In The
Supreme Court Of The United States

OCTOBER TERM, 1979

DIXON D. COWLEY, d.b.a. Cowley Pump & Supply, GRAHAM L. COWLEY and HUGH H. COWLEY, d.b.a. Cowley Bros. Supply, and CARDER, INC. d.b.a. Ranchers Supply Company

Petitioners,

vs.

BRADEN INDUSTRIES, INC., a Delaware corporation, doing business in the State of Arizona

Respondent.

SUPPLEMENTAL APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 7, 1980

(TRIAL JUDGE'S SECOND OPINION)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV-72-695-PHX

DIXON D. COWLEY, et al.,
Plaintiffs

vs.

BRADEN INDUSTRIES, INC.
Defendant

BEFORE HON. JAMES M. FITZGERALD,
JUDGE PRESIDING

DATE: August 31, 1977
TIME: 11:35 a.m.
SUBJECT: Judge's Ruling

PROCEEDINGS

THE COURT: I wish to place of record now my rulings and findings on the motion for a new trial or for amended findings in Cowley versus Braden Industries.

I previously made findings and conclusions on the record in this case last January 20th of this year. Subsequently, the plaintiffs have filed a timely motion for a new trial or alternatively for amended findings and conclusions. The motion has been thoroughly briefed and argued.

One issue raised by the motion for a . ew trial merits further consideration. Cowley contends that I have misapplied the rule of reason to the facts of this case. In light of the recent decision of the Supreme Court in Continental T. V. versus GTE Sylvania, 45 U. S. Law Week 4828, June 21, 1977, the dispositive issue is whether Aermotor's shipping policy constituted a reasonable trade restraint. The GTE case held that vertical restrictions on distributors should be judged under the rule of reason standard. I have examined the reasonableness of the shipping policy of Aermotor in light of the facts and the relevant case law, including GTE.

Cowley argues that when properly analyzed, Aermotor's shipping policy must be found to be an unreasonable trade restraint because the shipping policy functioned to reduce intrabrand competition, and this decrease in intrabrand competition was not justified or offset by any benefit to interbrand competition. According to Cowley, the key question in applying the rule of reason test to a vertical restriction is whether the restraint on intrabrand competition produces net economic benefits through enhancement of interbrand competition. Unless the answer to that is in the

affirmative, then the vertical restriction must be considered an unreasonable restraint of trade.

Plaintiffs suggest that GTE emphasizes that competitive impact, in terms of potential for intrabrand harm or interbrand benefit, is the pivotal factor in evaluating a vertical restriction. This is correct. However, the Supreme Court in GTE was not discussing how to analyze a restriction under the rule of reason test. Instead, in GTE the Court was concerned with determining when a restriction should be judged under the per se rule as opposed to the rule of reason. We note from the decision that a court should apply the per se rule of illegality only after it has considered the competitive impact of the challenged restriction and has concluded that the anticompetitive consequences outweigh the pro-competitive consequences. Under such circumstances the effect on competition is pernicious and without any redeeming virtue.

In commenting upon the favored rule of reason test, the Court said:

> "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."
> 45 U. S. Law Week at 4831.

The Court in GTE also quoted with approval the statement of the rule of reason by Justice Brandeis in Chicago Board of Trade versus United States, 246 U.S. 231, 1918. Quoting from Chicago Board of Trade:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of the intent may help the court to interpret facts and to predict consequences."

These instructive statements of the rule of reason reflect plaintiffs' contention that Aermotor's shipping policy must be deemed an unreasonable restraint if it results in a net decrease in competition in the market place as a whole. Plaintiffs' application of the rule of reason would operate like a partial per se rule; foreclosing the need to look to all of the circumstances and to weigh the purpose and justification for the restriction against its competitive effects. Plaintiffs' rule of reason analysis would hold that all vertical restrictions imposed by a manufacturer with a dominant market position would be unreasonable. Such a result is contrary to GTE. The teaching of GTE is that vertical restrictions must be judged on an individual basis for reasonableness. As Justice White points out in his concurring opinion in

GTE, the Court could have distinguished U. S. versus Schwinn and Company and thereby save the application of the per se rule in Schwinn on the basis that Schwinn enjoyed a dominant market position and, therefore, the territorial restrictions on distributors adversely affected both intrabrand and interbrand competition. The Court, however, in GTE expressly overruled Schwinn rather than distinguishing it and thereby implied that it is not necessarily unreasonable for a dominant manifacturer such as Schwinn to impose territorial restrictions as part of its marketing practice.

While I reject plaintiffs' contention that the determinative factor in the rule of reason analysis of Aermotor's shipping policy is the net competitive impact, the competitive effect of the shippling [*sic*] policy is the single-most important factor in determining its reasonableness. The effect of the shipping restriction on intrabrand and interbrand competition must be considered in light of the purpose of the restriction and possible alternative means to accomplish that purpose in order to determine if the restriction is reasonable.

I now turn to the application of the rule of reason to the facts of this case. On re-examination of the circumstances, my conclusion remains the same: the shipping policy is not an unreasonable restraint of trade. Several of the factors which lead to this conclusion are as follows:

1) Purpose. The purpose of the shipping policy was to make effective the independent exclusive distributor part of the Aermotor marketing system. The shipping policy is an integral part of the distribution system which moves all Aermotor products, pumps as well as windmills. Aermotor is a relative newcomer in the pump

market with a minor market share. Aermotor desires an efficient distribution system in order to effectively compete in the pump and windmill markets. The requirement that a distributor take goods into his trade area before selling them improves the efficiency in marketing since it serves to insure that the distributor will maintain a proper stock of goods and will intensively promote sales in his trade area.

Cowley and other Aermotor distributors received the distributors' discount, a longer discount than that offered dealers, as consideration for performing these stocking and promotion functions. When Cowley shipped windmills directly from the factory to Carder in Colorado, he took advantage of the discount without incurring overhead for stocking the mills and promoting their sale in his trade area.

2) Alternatives. Aermotor's requirement that distributors take goods into the area of their distributorship before selling to dealers was necessary to maintain an efficient independent distributorship system. Without the shipping policy, Aermotor's distributorship system would have eroded because distributors would lack incentive to stock and promote Aermotor products in their own trade areas. According to the credible and uncontradicted expert marketing testimony of Dr. Hamm, a "conflict channel" is created when a distributor is permitted to function as a broker and make easy direct sales into another distributor's area as did Cowley. The distributor whose territory is raided resents the direct sales into his marketing area and loses incentive to stock and promote products in his own area. This is precisely what happened when Cowley sold directly to Carder in the area of Bennett's distributorship. To avoid this conflict

between distributors, manufacturers commonly impose a requirement similar to Aermotor's shipping policy that distributors must take the product into their distributorship area before selling into the market.

There was no showing of any effective alternative means to maintain an effective distributors' system. Plaintiffs suggest that Aermotor could have applied the trans-shipment policy to pumps only, leaving distributors free to sell mills directly from the factory. This would be tantamount to abolishing the exclusive distributorship system with respect to windmills; it is not a reasonable alternative to maintaining an efficient and smooth running distributorship system.

3) Competitive Impact. The most important factor is the effect of the shipping policy on competition in the windmill market. The competitive effect in the market as a whole was not substantially adverse. Intrabrand competition between distributors was decreased. However, this competition between Aermotor distributors for windmill sales was not completely eliminated; it was regulated.

Significantly, interbrand competition existed to provide a check on any potential exploitation of intrabrand market power from Aermotor's dominant windmill market position. Competing brands of windmills, usually Dempsters, reasonably interchangeable with Aermotor windmills were available to distributors, dealers and consumers.

Finally, there was no proof that interbrand competition was either benefitted or harmed by Aermotor's shipping policy. For example, plaintiffs did not show that Aeomotor increased its share of the

windmill market by reason of the shipping policy and exclusive distributorship marketing system. In fact, there was evidence that Aermotor's competitors, notably Dempster, employed a similar distributorship system.

Possibly the absence of proof in these significant areas or the proof offered may have been significantly effected since the case was presented originally on the basis of a per se violation under the Schwinn standard.

To summarize, the record demonstrates that Aermotor's shipping policy was designed to effectuate an efficient, independent distributorship marketing system; was reasonably related to the goal of efficient marketing of Aermotor products; and had no substantial adverse effect on competition in the windmill market as a whole. Under these circumstances, the shipping policy is not an unreasonable restraint of trade.

On the basis of the findings and conclusions previously made, the motion for a new trial is denied.

(Proceedings terminated at approximately 11:55 a.m.)

CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondent, Braden Industries, Inc., a member of the Bar of this Court, hereby certifies that on the 7th day of May, 1980, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States, caused three copies of the foregoing Supplemental Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari to be deposited in the United States Mails at Tulsa, Oklahoma, with first class postage prepaid, addressed to the following counsel of record as follows:

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